

**United States Department of Labor
Employees' Compensation Appeals Board**

RAYMOND E. BULGER, Appellant

and

**DEPARTMENT OF COMMERCE, BUREAU
OF THE CENSUS, Wilkes-Barre, PA, Employer**

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**Docket No. 04-1091
Issued: October 13, 2004**

Appearances:

James J. Conaboy, Esq., for the appellant

Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chairman

DAVID S. GERSON, Alternate Member

MICHAEL E. GROOM, Alternate Member

JURISDICTION

On March 17, 2004 appellant, through his attorney, filed a timely appeal of a February 24, 2004 merit decision of a hearing representative of the Office of Workers' Compensation Programs that affirmed an April 30, 2002 decision terminating his compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3 the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant's disability and need for medical treatment related to his March 22, 1999 employment injury ceased by May 19, 2002.

FACTUAL HISTORY

On March 23, 1999 appellant, then a 53-year-old enumerator, filed a claim for compensation for a traumatic injury to his neck, back and knees sustained in a March 22, 1999 automobile accident. He stopped work on March 23, 1999 and received continuation of pay from that date until May 6, 1999, after which the Office began paying compensation for

temporary total disability for the accepted conditions of cervical and lumbar strains. In a May 6, 1999 letter, appellant stated that he injured his low back while working for a private employer in 1992, that he received a settlement of \$60,000.00 in October 1999; and that he was “still treated under the medical liability part of [his] claim.”

In a May 6, 1999 report, Dr. Leroy J. Pelicci, a Board-certified neurologist, who began treating appellant on April 19, 1999, diagnosed cervical and lumbar radiculopathy and indicated that appellant was totally disabled beginning March 22, 1999. Dr. Juan D. Gaia, a Board-certified radiologist, stated that a magnetic resonance imaging (MRI) scan he performed on May 3, 1999 revealed mild degenerative changes with loss of stature at multiple discs of the cervical spine and very small or very minimal disc herniation centrally at C3 through C7 and significant degenerative changes of all the lumbar discs with narrowing of all the disc spaces and small herniation at L5-S1 and L4-5. In a June 3, 1999 report, Dr. Pelicci reviewed the MRI scan findings and stated, “He has multiple disc herniation present in the lumbar area, three disc herniation in the cervical area four, so that the auto[mobile] accident caused severe pathology throughout the spinal column area to the point where he is having a hard time really dealing with this.” Dr. Pelicci continued to treat appellant with trigger point injections and physical therapy and indicated that he continued to be totally disabled.

On October 8, 1999 the Office referred appellant, his medical records and a statement of accepted facts to Dr. Sanford Sternlieb, a Board-certified orthopedic surgeon, for a second opinion whether he continued to be disabled due to his March 22, 1999 employment injury. In an October 21, 1999 report, Dr. Sternlieb set forth the history of appellant’s March 22, 1999 injury and the treatment received thereafter and of a 1992 injury to his low back resulting in bilateral leg pain, treatment by many physicians and a disability rating by the Social Security Administration. On interview appellant complained of neck discomfort without radiation to the upper extremities, episodes of paresthesias along the left arm and fingers and pain in the lumbar area with occasional radiation into the left leg as far as the ankle. On examination Dr. Sternlieb found no specific area of tenderness or paravertebral muscle spasm, virtually nonexistent cervical and lumbosacral spinal motion on request but “a great deal more painless motion in all segments of his spine” when moving about and changing positions, very variable sensation to light touch and no muscle weakness or atrophy. Based chiefly upon findings in x-rays and MRI scan studies, Dr. Sternlieb diagnosed degenerative changes of the intervertebral discs not related to the March 22, 1999 motor vehicle accident. He disagreed with the radiologist’s interpretation of the MRI scan, stating, “The findings which he has described are a product of a normal aging process and have no relation to any disc herniation. [Appellant] does not have any herniated discs given the fact that there is nothing in his physical examination to support this diagnosis.” Dr. Sternlieb concluded:

“While it is possible that he had some mild soft tissue strains as a result of the automobile accident he was involved in, it is highly doubtful that these would have been severe enough to last more than 8 to 10 weeks. I say this because he was driving on a snow-covered road (by his history), he had his seat belt in place and the damage to the car was a total of \$288.81. Furthermore, he has a history of previous complaints about his back which were longstanding and for which Dr. Pelicci had treated him...”

On May 16, 2000 the Office referred appellant, the case record and a statement of accepted facts to Dr. Peter Feinstein, a Board-certified orthopedic surgeon, selected as the impartial medical specialist to resolve the conflict of medical opinion between Drs. Pelicci and Sternlieb. In a July 27, 2000 report, Dr. Feinstein reviewed the prior medical records including the MRI scan done May 3, 1999, stating that the findings of degenerative changes involving appellant's entire cervical and lumbosacral spine could not possibly be related to trauma but were longstanding and preexisting and progressive in nature consistent with appellant's history of a 1992 low back injury for which he was treated with monthly trigger point injections by Dr. Pelicci. Appellant also provided a history of a February 2000 motor vehicle accident that made his condition "much worse." Dr. Feinstein noted that a pain drawing by appellant "indicates essentially total involvement of his spine in the cervical, thoracic, lumbar and buttocks region with radicular distributions in the arm and leg that can only possibly be consistent with a longstanding, extensive degenerative condition as opposed to any traumatic type of change." Dr. Feinstein stated that appellant's physical "examination in general revealed multiple inconsistencies that would be impossible on the basis of any known human anatomical pathways and would indicate evidence of invalid illness behavior and symptom exaggeration." These included diminished sensation of the left lateral thigh and hypersensitivity in the entire rest of the left lower extremity, forward flexion of the thoracolumbar area limited to 20 degrees on a subjective basis with no objective involuntary muscle spasm to confirm this limitation, a complaint of no feeling in the left knee joint line and of hypersensitivity one-half inch below this and a "bizarre" upper extremity sensory evaluation with decreased sensation only in the right second and third fingers, the left first, second, third and fifth fingers and the left lateral arm. Dr. Feinstein concluded:

"Overall, [appellant's] objective diagnostic studies, in general, indicate a systemic degenerative condition that is longstanding, preexisting and progressive in his cervical and lumbar spine, independent of any work-related accident in March 1999.

"Furthermore, [appellant's] clinical presentation at this time presents very definite evidence of invalid illness behavior and symptom exaggeration with clearly inappropriate findings based on any known human anatomy.

"Therefore, in the overall context of this individual's case, it is possible that he may have aggravated or irritated a longstanding, preexisting condition as a result of the accepted injury of a cervical and lumbar strain related to the March 1999 accident.

"As of the current time any sprain or strain or irritation which he may have suffered has completely resolved and his current complaints are definitively and clearly related to the longstanding, preexisting and systemic degenerative condition in his neck and lower back. In addition, any of his current complaints by his own history, would be related to a subsequent nonwork-related situation in February of 2000, in which he states that incident made his prior complaints 'much worse.'

“The normally expected timeframe for resolution of an irritation of the aggravation of an underlying condition consistent with this individual’s March 1999 incident would be six weeks to three months, with occasional individuals taking up to six months. There is nothing in the medical records to indicate that timeframe would be anything other than what was expected and documented in terms of this individual’s response to his injury and treatment, especially in the context of the history as noted above and the current physical examination.

“I do not believe that any treatment rendered after six months, giving him the benefit of the doubt of the outside limits of the timeframe for healing would be in any way appropriate, reasonable or causally related to the March 1999 automobile accident.

“Any total disability related to that incident would be in the six[-]week to three[-]month timeframe noted above for the reasons stated above.

“Any total disability currently or at other time periods would clearly and definitively not be related to the March 1999 incident.

“As of the current time this individual does not require any treatment related to that accident and his prognosis is excellent given the fact that I believe he has made a full and complete recovery from the accepted injury.

“His prognosis overall is guarded given his extensive degenerative change and treatment should be symptomatic pain management in terms of anti-inflammatory, Neurontin, antidepressants and pain medication.”

On October 4, 2001 the Office issued a notice of proposed termination of compensation and medical treatment on the basis that appellant had recovered from the March 22, 1999 employment injury. Appellant, through his attorney, disagreed with the proposed termination and submitted a November 13, 2001 report from Dr. Pelicci stating that appellant suffered flexion extension injuries to his neck and lumbar area from which he had not recovered and that he was still totally disabled.

By decision dated April 30, 2002, the Office terminated appellant’s compensation, including medical benefits effective May 19, 2002 on the basis that he had recovered from his March 22, 1999 employment injury.

At a hearing held at appellant’s request on November 19, 2003, he testified that he recovered “to a certain extent” from his 1992 low back injury and described his February 2000 motor vehicle accident and its effects. Appellant’s attorney contended that Dr. Feinstein’s report was not entitled to any credibility because “Dr. Feinstein is somewhat well known in these parts as a doctor who offers the opinion that the referring agency is looking for,” that he was no longer used by defense firms in state workers’ compensation cases because he had no credibility and that he was “no longer used by the liability insurance firms because his books have been opened and injuries are now aware of the monies that he makes in terms of examining and testifying on behalf of the defense.” Appellant’s attorney submitted a portion of a January 4, 2002 transcript

of Dr. Feinstein's deposition in a civil case in Pennsylvania, in which Dr. Feinstein testified that he probably had income in excess of \$500,000.00 per year from independent medical examinations and testimony associated with them.

By decision dated February 24, 2004, an Office hearing representative found that Dr. Feinstein's report constituted the weight of the medical evidence and established that appellant's injuries related to his March 22, 1999 employment injury had resolved.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits. After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.¹ The right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for disability.² To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition which require further treatment.³ In situations where there are opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.⁴

ANALYSIS

The Office accepted appellant's claim and paid compensation for temporary total disability beginning May 7, 1999. Appellant's attending Board-certified neurologist, Dr. Pelicci, supported that appellant continued to be totally disabled due to his March 22, 1999 employment injury. The Office referred him to Dr. Sternlieb, a Board-certified orthopedic surgeon, who concluded in an October 21, 1999 report that appellant had recovered from this injury.

This created a conflict of medical opinion. Pursuant to section 8123(a) of the Federal Employees' Compensation Act,⁵ the Office referred appellant to Dr. Feinstein to resolve this conflict. Dr. Feinstein's July 27, 2000 report was based on a complete and accurate history and a review of appellant's prior medical records. Dr. Feinstein concluded that appellant may have aggravated or irritated his longstanding, preexisting degenerative spinal condition but, that any

¹ *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

² *Thomas Olivarez, Jr.*, 32 ECAB 1019 (1981).

³ *Furman G. Peake*, 41 ECAB 361 (1990).

⁴ *James P. Roberts*, 31 ECAB 1010 (1980).

⁵ 5 U.S.C. § 8123(a) states in pertinent part "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."

such aggravation and any strain or sprain had completely resolved, with his ongoing complaints and need for treatment being due to his preexisting degenerative condition and to a February 2000 motor vehicle accident.⁶ Dr. Feinstein provided rationale for his conclusions, explaining that the degenerative changes throughout the lumbar and cervical spine on an MRI scan six weeks after the March 22, 1999 injury could not possibly be of traumatic origin, that the normal timeframe for resolution of the effects of the March 22, 1999 injury would be at most six months and that there was nothing in the medical records to indicate the timeframe would be anything other than what was expected.

Appellant's attorney contends that Dr. Feinstein's report should not be given any weight because the physician was biased toward defendants. Unsubstantiated allegations of bias are not sufficient to exclude or diminish the probative value of an impartial medical examiner's report.⁷ The deposition testimony of Dr. Feinstein shows only that he generates income from performing independent evaluations and testifying about them, but does not establish that these evaluations are done only for defendants or otherwise show bias by Dr. Feinstein. His report constitutes the weight of the medical evidence and is sufficient to meet the Office's burden of proof to terminate appellant's compensation.

CONCLUSION

The weight of the medical evidence establishes that appellant no longer is disabled or in need of medical treatment as a result of his March 22, 1999 employment injury.

⁶ The February 2000 accident had no relation to appellant's employment.

⁷ *Geraldine Foster*, 54 ECAB ____ (Docket No. 02-66, issued February 28, 2003).

ORDER

IT IS HEREBY ORDERED THAT the February 24, 2004 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 13, 2004
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member